



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
WASHINGTON, D.C. 20460

OFFICE OF  
THE ADMINISTRATOR

**Memorandum**

**Subject:** Questions/Answers Relating to OSDBU's Revised July, 1997 Guidance for Utilization of Small, Minority and Women's Business Enterprises in Procurement

**From:** Jeanette L. Brown, Director  
Office of Small and Disadvantaged  
Business Utilization

**To:** MBE/WBE Coordinators, Regions 1-10, Headquarters and Cincinnati

I am pleased to transmit to you a hard copy of the Questions/Answers, relating to OSDBU's revised July, 1997 Guidance, a draft of which we distributed at the July 20-22 MBE/WBE Conference. This document has been reviewed by Office of General Counsel, and you may distribute it to your financial assistance award recipients. The document may be accessed on the Internet at <http://www.epa.gov/osdbu>. For your convenience, we also are transmitting an electronic copy to you.

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# **QUESTIONS/ANSWERS**

## **8/18/98**

Environmental Protection Agency (EPA) Office of Small and Disadvantaged Business Utilization (OSDBU) Headquarters has received a number of written and oral questions relating to its July 1997 revised Guidance Document. In these Questions and Answers, EPA is attempting to address the significant questions it has received regarding FY 1998. Additional State Revolving Fund-related questions will be addressed in a separate document. Most of the answers to these questions will apply to FY 1999. To the extent there are changes for FY 1999, EPA will issue further guidance. EPA will attempt to address other questions through other means, including the rulemaking process it anticipates initiating in FY 1998.

### **General Questions**

Q1. Does an assistance recipient have to continue to comply with the six steps required in the assistance award after it reaches the goals set forth in the assistance award?

A1. Yes. The six steps constitute outreach, recruitment and other race/gender neutral activities as part of the recipient's good faith efforts to achieve the fair share objective. See, e.g., 40 CFR 31.36(e) and 30.44(b). EPA does not believe it is appropriate for these race/gender neutral activities to be discontinued by a recipient merely because it reaches the MBE/WBE goals set forth in the award.

Q2. Does EPA's interpretation of the six affirmative steps give the assistance recipient the authority to:

- a. Require good faith efforts on the part of contractors?
- b. Allow the recipient to use the preference points it currently uses as a mechanism to reach the negotiated MBE/WBE goals?
- c. Require outreach efforts to MBEs/WBEs?

A2. a. Yes.  
b. See Answer to Question number 29.  
c. Yes.

- Q3. Will small grants be exempt from the availability analysis requirements? If so, which requirements apply?
- A3. There is no exemption for small grants; they are subject to the same availability requirements as other assistance agreements. However, local governments, institutions of higher education, hospitals and other non-profit organizations have the option of using their applicable State MBE/WBE goals rather than negotiating their own goals with EPA based on availability.
- Q4. Can assistance agreements with procurements under a certain threshold be exempt from the availability requirements, and if so, which requirements apply?
- A4. There is no threshold exemption. All assistance agreements need to be in compliance with the applicable requirements.
- Q5. Can States have different MBE/WBE goals on different types of contracts?
- A5. States can have different goals for different EPA programs, e.g. different goals for Superfund, Clean Water and Drinking Water program grants, based on availability of qualified MBEs and WBEs in the relevant market to do the work. In the case of the Clean Water and Drinking Water State Revolving Fund Programs, the MBE/WBE goals may vary among different projects, based on the unique nature of the applicability of cross cutting requirements, such as MBE/WBE requirements, to those programs.
- Q6. What is the program office's role and responsibility?
- A6. For other than assistance awards administered by EPA Regions, the appropriate EPA award official or designee is responsible for negotiating a "fair share" and for ensuring that project officers, other staff and recipients comply with EPA's "fair share" policy. In the case of assistance awards administered by the Regions, the Regional Administrator or his designee is responsible for ensuring the negotiation of "fair share" objectives. Program Offices should work closely with their Regional MBE/WBE Coordinators, in the case of Regional assistance awards, and with the EPA SDBU Coordinators in Headquarters and Cincinnati, as well as with OSDBU, in the case of Headquarters

assistance awards, to ensure that EPA's "fair share" policy is carried out. In particular, program offices should ensure that MBE/WBE compliance is included in annual project reviews, and project officers should include MBE/WBE compliance as part of their project monitoring reviews.

- Q7. If an assistance award is made before September 30, 1997, do the new availability analysis requirements apply?
- A7. If an assistance award is made on or before September 30, 1997, the FY 1997 minimum 8% goal requirements apply, or for Clean Air Act research grants the minimum 10% goal requirements apply, except for changed or new procurements in which new bids are initiated; for such procurements, the new availability analysis requirements apply, i.e., the FY 1998 goals.
- Q8. Should MBE/WBE compliance be included in annual project reviews?
- A8. Yes, it is important that MBE/WBE compliance be included in annual project reviews in order to maintain effective oversight of the program.
- Q9. Can States have different goals for different parts of the State?
- A9. Yes, if the goals are based on an availability analysis. States may also propose blended goals for the whole State based on the amount of contracts awarded in specific parts of a State.
- Q10. How will CWA non-Title II Congressional add-on grants contained in EPA Appropriations Acts be addressed?
- A10. Recipients of CWA non-Title II Congressional add-on grants may negotiate their own MBE/WBE goals with their Regional MBE/WBE Coordinators if they wish to do so; otherwise, the applicable State goals apply. If a recipient did not receive an assistance award for FY 1997, during the phase-in period (for FY 1998 i.e., until its State's FY 1998 MBE/WBE goals are approved by EPA) its minimum MBE/WBE goals need to total 8%. If a recipient received an assistance award for FY 1997, during the phase-in period, its MBE/WBE goals would be its FY 1997 goals.

Q11. What requirements apply to grants to universities, hospitals and other non-profit organizations?

A11. During the phase-in period, for FY 1998 (i.e., until their State's FY 1998 MBE/WBE goals are approved by EPA no later than May 31, 1998), they will continue to use their FY 1997 MBE/WBE goals. If they did not receive an assistance award for FY 1997, their minimum MBE/WBE goals will total 8%; in the case of assistance awards to implement the Clean Air Act Amendments of 1990, their minimum goals will total 10%. After the phase-in period, for FY 1998, they will use the goals applicable to the State Agency which would have jurisdiction over the award if the award were made to the State (e.g., Department of Environmental Quality, Agriculture, etc.). For projects where it is unclear which State Agency would have jurisdiction, they will use the FY 1998 goals of the State's primary environmental agency. For multi-media projects, they will use the goals of the State Agency that would have responsibility for the preponderance of the procurement activity if the project were undertaken by the State. EPA will furnish these recipients with the applicable goal numbers. If they do not want to rely on their State's MBE/WBE goals, they need to submit their proposed MBE/WBE goals based on availability of qualified MBE/WBEs to do the work in the relevant market for construction, equipment, services, and supplies to their Regional MBE/WBE Coordinator within 30 days of award in order for EPA to approve them no later than 30 days thereafter.

Q12. How will the availability analysis requirements be applied to research implementing the 1990 Clean Air Act Amendments?

A12. See Answer to question number 11. Additionally, if the recipient is a State Agency, it will need to have EPA approve its "fair share" goals in the same manner as other State Agencies for other programs.

Q13. How will availability analyses be applied to research other than for research implementing the 1990 Clean Air Act Amendments?

A13. See Answer to question number 11.

Q14. Can MBE/WBE conditions be placed in the work plan which is incorporated in the assistance agreement rather than in the agreement itself?

A14. No, the MBE/WBE special conditions must be in the special conditions section of the assistance agreement itself.

Q15. How will the 10% flexibility allowed grant recipients in moving funds from one direct cost category to another be affected for FY 1998 as EPA implements the July 1997 Guidance Document?

A15. If an assistance agreement recipient moves funds from one project cost category to another, those additional funds are subject to EPA's MBE/WBE requirements if procurement is involved. If a new procurement is initiated in FY 1998 as a result of this moving of funds, the applicable MBE/WBE goals would be the recipient's FY 1997 MBE/WBE goals, if the procurement is initiated before the recipient's FY 1998 goals become effective (the recipient's FY 1998 goals must be approved by EPA by May 31, 1998). If the procurement is initiated after the FY 1998 goals become effective, those goals would apply. If no new procurement is initiated but rather an existing contract is amended to increase the procurement dollar amount, the MBE/WBE goals for that contract would continue to apply to the additional funds.

Q16. How will procurements already in place for FY 1998 Congressional add-ons be affected by the Guidance requirements for FY 1998 i.e. what happens if a recipient forward funded its procurement before Congress enacted EPA's FY 1998 appropriation?

A16. EPA anticipates that such situations will turn out to be rare. If the assistance agreement recipient received an award for FY 1997, it should use its FY 1997 MBE/WBE goals. If it did not receive an EPA assistance award in FY 1997, it should use a minimum of 8%. To the extent it initiates any new procurement in FY 1998, it should use the applicable FY 1998 goals specified in Enclosure B. "Implementation for Local Governments" in EPA's November 19, 1997 letter to assistance agreement recipients. (i.e., either use the applicable State MBE/WBE goals or negotiate their own goals with EPA).

Q17. How will the availability requirements apply to grants to universities outside the South for work to be performed in the South” **(NOTE: same concept applies elsewhere as well)**

A17. The applicable MBE/WBE goals are those in the relevant market, not where the recipient is physically located.

Q18. For TAG recipients are the goals to be used those for the State where the project is located?

A18. Yes.

Q19. How will Superfund cooperative agreement remedial design awards and remedial action awards be affected by the FY 1998 MBE/WBE requirements?

A19. These awards are to be treated in the same manner as other assistance awards.

Q20. Should MBE/WBE goals negotiated early in 1998 be modified based on the results of detailed availability analyses or of disparity studies completed later in the fiscal year?

A20. Yes. If EPA approves the new goals, procurements initiated thereafter will have the new goals apply to them. Fair share objectives should be based on the most accurate data available.

Q21. How will EPM appropriated funds be affected by the FY 1998 implementation of the Guidance Document?

A21. EPM funds are treated in the same manner as other EPA appropriated funds.

Q22. For non-profit organizations, which MBE/WBE goals apply, those where the recipient is located or those where the project takes place, in cases where a jurisdiction has its own local MBE/WBE program?

A22. The MBE/WBE goals which apply are those where the project takes place. However a locality’s MBE/WBE goals need to be approved by EPA based on availability; if they are not approved by EPA, the applicable goals for the State in which the project takes place apply.

Q23. Can MBE/WBE goals be negotiated for two years at a time based on availability?

A23. No. MBE/WBE goals need to be negotiated annually.

Q24. Are procurements under \$100,000 exempt from the MBE/WBE goals based on availability?

A24. No. There is no dollar threshold exemption from EPA's MBE/WBE requirements.

Q25. Must fair share negotiations take place for Indian Tribes and Trust Territories.

A25. For FY 1998, EPA is not requiring "Fair share" negotiations with Indian Tribes and Trust Territories.

Q26. Does EPA have any general guidance with respect to California Proposition 209?

A26. It is important to bear in mind that California Proposition 209 explicitly exempts affirmative action programs that public entities in California must comply with as a condition of receiving federal funding. As a result of that exemption, Proposition 209 does not affect the operation in California of EPA's "fair share" assistance award program.

Q27. Is small business considered separate from minority business, and does an assistance agreement recipient have to report figures for both?

A27. Small businesses are considered separate from minority businesses. EPA's six affirmative steps (40 CFR (31.36(e)) and positive efforts in the case of assistance awards to non-profit organizations (40 CFR 30.44(b)) apply to small, minority and women-owned businesses. However, "fair share" goals are only negotiated for minority and women-owned businesses. Accordingly, recipients only need to file reports on EPA Form 5700-52A regarding their results in achieving their MBE/WBE "fair share" objectives.



Q28. What does using the services and assistance of the Small Business Administration (SBA) and the Minority Business Development Agency of the Department of Commerce involve? Is sending RFPs to them or utilizing a list they have compiled sufficient?

A28. What constitutes an appropriate use of the services and assistance of the SBA and the Minority Business Development Agency (MBDA) of the U.S. Department of Commerce depends on the circumstances. At a minimum, it may involve using the services of outreach programs sponsored by the MBDA and/or the SBA to recruit bona fide firms for placement on small business enterprises (SBEs), minority business enterprises (MBEs), women business enterprises (WBEs) or small business in rural areas (SBRAs) bidder's lists to assist the firms in the development of bid packages. In that regard, recipients and prime contractors may use SBA's Pro-Net Procurement Marketing and Access Network services to identify available SBEs, MBEs, WBEs and SBRAs to do the work. It may also involve seeking out Minority Business Development Centers (MBDCs) to assist recipients and prime contractors in identifying MBEs for potential work opportunities on EPA-assisted projects, as well as using MBDA's Phoenix dBASE System to identify available MBEs to do the work.

Q29. When can race/gender conscious efforts be used?

A29. As stated on page 4-7 of EPA's July, 1997 Guidance, "[t]o the extent race and/or gender neutral efforts... prove to be inadequate to achieve a fair share objective for MBEs and WBEs, a recipient or prime contractor is authorized to take reasonable race and/or gender conscious action to the extent necessary to more closely achieve the fair share objective. Any use of race and/or gender conscious efforts must not result in the selection of an unqualified MBE or WBE." A recipient needs to notify EPA in advance of any race and/or gender conscious action it plans to take to more closely achieve the fair share objective.

Q30. If MBE/WBE status is challenged for EPA purposes what action should the Regional MBE/WBE Coordinator take? Allow award, then pursue? Stop award until investigation?

A30. EPA will not entertain complaints by firms challenging another firm's status as an MBE/WBE under EPA's bid protest procedures. However, if a potential EPA assistance recipient is suspended or debarred due to its misrepresentation of MBE/WBE status (or for any other reason), no award should be made to that potential recipient unless the Administrator or her designee has granted an exception. See 40 CFR 32.200 et seq. If the matter involves an allegation of waste, fraud or abuse, it should be referred to EPA's Office of Inspector General.

Q31. Does EPA still allow self certification for MBEs and WBEs?

A31. Yes. EPA accepts MBE self certifications, as well as certifications from the SBA and other Federal Agencies and from State agencies. See, e.g., 40 CFR 6015(a)(26) and (54).

Q32. In the case of continuing environmental program grants, if applications are approved by September 30, 1997 assistance recipients were allowed to incur pre-award costs. What happens if they did so for procurement?

A32. If a procurement was awarded before September 30, 1997, the goals in effect for FY 1997 apply, except for changed or new procurements in which new bids are initiated; for such procurements the FY 1998 goals apply.

Q33. Should non-federal money be included in the base? For Superfund, depending on the site, State or Federal money can be allocated in the base?

A33. For EPA Assistance awards, all expenditures are deemed to include the Federal share. The MBE/WBE requirements apply to the assistance award as a whole, i.e., including any required cost share funds contributed by the recipient.

Q34. How is procurement contained in the "other" category to be treated?

A34. Procurement contained in the "other" category should be treated in the same manner as other procurement.

Q35. Is a recipient or prime contractor required to submit documentation of its good faith efforts?

A35. A recipient and/or prime contractor is required to exercise good faith efforts to meet the fair share objective. Recipients and prime contractors who award subcontracts must maintain documentation of their good faith efforts so that it can be available for review as part of an EPA project audit or submitted to EPA if requested by the Agency. See 40 CFR 31.36l(l)(10) and (11) 31.42 and 40 CFR 30.2(c)(c), 30.48(d), 30.53 (for non-profit organizations).

Q36. What are non-Title II wastewater treatment construction grants?

A36. Non-Title II wastewater treatment construction grants are grants which Congress earmarks for specific communities under the authority of EPA's annual appropriations.

Q37. When are assistance recipients required to submit EPA Form 5700-52A, "MBE/WBE Utilization under Federal Grants, Cooperative Agreements, and Interagency Agreements" to the EPA award official?

A37. As specified in the instructions to that form, assistance recipients are required to report to EPA within one month following the end of each Federal fiscal quarter or annually as in the agreement; Part 30 assistance recipients (i.e., awards to institutions of higher education, hospitals and other non-profit organizations) and recipients of continuing environmental program awards need to file annual reports within 30 days after the end of the Federal fiscal year.

Q38. What is meant by the term "Delegated State" contained on page 3-1 of EPA's July 1997 Guidance?

A38. The term "Delegated State" as used in the Guidance means that the MBE/WBE functions have been delegated to the State. The concept of a delegated State does not apply to the CWA and SDWA SRF programs since they were intended to be State designed and managed.

Q39. To which EPA programs does the “fair share” policy apply?

A39. As stated on page 1-1 of EPA’s July, 1997 Guidance, the policy applies “to all contracts/procurements for supplies, construction, equipment and services under any EPA grant or cooperative agreement.” The Guidance’s discussion of a number of EPA programs on pages 4-2 and 4-3 (e.g., Non- Title II Grants, Superfund and the SRF programs) are illustrative only; those programs specifically mentioned on these 2 pages do not represent the totality of programs to which the “fair share” policy applies.

Q40. What is meant by the statement in the Guidance (page 5-2) that “[t]he Regional Administrator or designee is also responsible for certifying the validity of the MBE/WBE data collected from the recipients”?

A40. The statement means that the Regional Administrator or designee is responsible to ensure that the data submitted by the Regions to EPA Headquarters accurately reflects the data submitted by the recipients to the Region and that the data makes sense.

Q41. If a State Agency has State legislated MBE/WBE goals, but there is no legislative history on how these goals were derived (e.g., no form of availability analysis) for FY 1998 can EPA accept these State-legislated goals?

A41. No. If there is no legislative history demonstrating the basis for the State’s adoption of its MBE/WBE goals, EPA cannot accept them without additional explanation as to why the State-legislated WBE/MBE goals reflect availability because post-Adarand, MBE/WBE goals must be based on availability of qualified MBEs and WBEs to do the work in the relevant market.

Q42. If a State’s disparity study justifies certain MBE/WBE goals, can a State Agency propose lesser MBE/WBE goals for FY 1998?

A42. Yes, if a State Agency can establish that the disparity study doesn’t adequately address the type of procurements it conducts. For example, if that procurement deals with high technology products and the disparity study does not adequately address these types of products, the State Agency could propose different MBE/WBE goals than the disparity study justifies, in order to account for this difference, based on availability of

qualified MBEs/WBEs to do the work, such goals could be lower or higher than the goals justified by the disparity study.

Q43. Are the costs incurred by EPA assistance recipients to comply with the availability requirements grant eligible?

A43. Whether these costs are grant eligible depends on the underlying statutory authority for the assistance award. For example, the costs of the construction component of an availability analysis ordinarily would not be allowable under continuing environmental program grants or training grants. However, they are potentially allowable under a grant for construction. EPA will provide additional guidance on this issue.

Q44. Can “very small” procurements be exempted from the affirmative steps/positive efforts (see 40 CFR 31.36(e) and 40 CFR 30.44(b)).

A44. At this time EPA will not establish such an exemption. EPA will reconsider this issue as a part of the rulemaking process the agency intends to initiate.

Q45. Can EPA reconsider its current position as stated on page 8-2 of the July 1997 Guidance document that “[i]f a minority or women-owned prime contractor awards more than 49% to a non MBE/WBE, no dollars will be reported for either?”

A45. EPA will consider changing its current position as part of the rulemaking process the Agency intends to initiate.

Q46. Can EPA reconsider its current position as stated on page 8-2 of the July 1997 Guidance document that “[r]ecipients may not count expenditures to MBEs or WBEs that act as a broker in a transaction?”

A46. EPA does not believe it is appropriate for recipients to count expenditures to MBEs or WBEs that act as a broker in a transaction because a broker acts as a conduit and does not, itself, perform, manage or supervise the work of its contract or subcontract in a manner consistent with normal business practices for contractors or subcontractors in its line of business. Additionally, EPA believes that counting brokers towards a recipient’s MBE/WBE goals would be inconsistent with the language of Public Law 102-389, which requires EPA “to the fullest extent possible, ensure that at least 8 per centum of Federal funding for prime and

subcontracts awarded in support of authorized programs,...be made available to [MBEs and WBEs]...(emphasis added).

Q47. Can EPA develop standardized definitions for “construction”, “equipment”, “supplies”, and “services”?

A47. EPA’s Part 31 regulations contain standardized definitions for “equipment” and “supplies”. See 40 CFR 31.3. The Federal Acquisition Regulation defines “construction” as...construction, alteration, or repair (including dredging , excavating and painting) of buildings, structures or other real property. For purposes of this definition, the terms, buildings, structures or other real property’ include but are not limited to improvements of all types, such as bridges, dams, plants, highways, parkways, streets, subways, tunnels, sewers, mains, power lines, cemeteries, pumping stations, railways, airport facilities, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, canals and channels. Construction does not include the manufacture, production furnishing, construction, alteration, repair, processing or assembling of vessels, aircraft, or other kinds of personal property.” See FAC 97-01 Subpart 36.102. EPA believes that this definition of “construction” can be used for MBE/WBE compliance purposes. There is no definition of “services” in the Federal Acquisition Regulation. However that regulation does define “service contract” as “a contract that directly engages the time and effort of a contractor whose primary purpose is to perform an identifiable task rather than to furnish an end item of supply...some of the areas in which service contracts are found include...advisory and assistance services...Architect-Engineering...” EPA believes this definition can be used as a guide to “services” for MBE/WBE compliance purposes.

Q48. What action may EPA take if a prime contractor is not complying with the six affirmative steps?

A48. EPA has a number of options it can take. First, of all, if the prime contractor can not document before the award of the contract to the grant recipient, or to EPA’s MBE/WBE Coordinator in Regions where the MBE/WBE function is not delegated to the State, that it has complied with the six affirmative steps, it should not be awarded the prime contract even if is the low bidder. This is because a prime contractor must demonstrate compliance with EPA’s MBE/WBE requirements, either at bid opening, if MBE/WBE compliance is made a matter of bidder

responsiveness, or before contract award if MBE/WBE compliance is made a matter of bidder responsibility. If EPA finds out after the contract has been awarded to the prime contractor that it has not complied with the six affirmative steps, EPA can take enforcement action against the grantee, e.g., wholly or partly suspend or terminate the award. See 40 CFR 31.43(a). In the case of the CWSRF program, the Regional Administrator can take the steps authorized by section 605 of the Clean Water Act, which may include withholding payments to the State until the State takes the corrective actions that the Regional Administrator has prescribed. See 40 CFR 35.3170.

Q49. What will EPA's position be if a State's FY 1998 MBE/WBE goals are not approved by the Agency by March 31, 1998?

A49. EPA has extended the State approval date to May 31, 1998. Additionally, EPA has taken the following position: (a) for those State agencies that have not met the May 31, 1998 date, they are to use the main State agency's fair share objectives pending completion of their negotiations with EPA; (b) for those States that have not met the May 31, 1998 date, they have until July 19, 1998 to complete their fair share negotiations with EPA. In the interim, they may award procurements using FY 1997 fair share objectives. If they do not meet the July 19, 1998 date, they are precluded from using grant funds for any procurements under any EPA grant awarded after July 19, 1998. In the event of an emergency, the State recipient may request a waiver, on a case by case basis, from Headquarters OSD BU.

Q50. Can EPA collaborate with the National Association of State Purchasing Officers regarding MBE/WBE procurement reporting?

A50. EPA is willing to meet with the National Association of State Purchasing Officers regarding MBE/WBE procurement reporting.

Q51. How will EPA address State disparity studies which are completed after a State's MBE/WBE FY 1998 goals are approved by the Agency?

- A51. For FY 1998, if a State completes a disparity study after its FY 1998 MBE/WBE goals have been approved by EPA, it should renegotiate those goals with the Agency based on the results of the disparity study.
- Q52. In the case of performance partnership grants, how are goals broken down between the 8% (non-CAA Amendments of 1990 research-related assistance agreements) and the 10% (CAA Amendments of 1990 research-related assistance agreements) combined goals?
- A52. This question should not pose a practical problem. The only grants that can go into performance partnerships are State program grants that are funded under the STAG account (e.g., CAA §105, CWA §106, etc.). Research grants generally are not eligible for inclusion in performance partnership grants because they are funded from the EPM account.
- Q53. Can EPA give States technical assistance in preparing availability analyses?
- A53. Assuming the availability of funding, EPA could issue a contract consistent with the Federal Grant and Cooperative agreement Act of 1977 to give States technical assistance in preparing availability analyses.
- Q54. What requirements apply to subrecipients of EPA financial assistance awards, especially what reporting requirements?
- A54. Subgrantees are required to comply with EPA's MBE/WBE requirements. See 40 CFR 30.5, 31.37. In order for grantees to meet their reporting requirements subgrantees must report to them in such a manner as will enable them to file their annual or quarterly MBE/WBE Form 5700-52A. The six steps apply to both EPA grantees and subgrantees. See 40 CFR 31.36(e), 30.44(b) and 30.2(cc).
- Q55. How will EPA address proposed "fair share" State goals which identify goals for disadvantaged business enterprises (DBEs) or small businesses (SBEs) but not specifically for MBEs or WBEs?



A55. EPA requires “fair share” negotiations which identify goals for minority business enterprises (MBEs) and women-owned business enterprises (WBEs). This is not a new requirement; it has been in effect for many years. See Answer to question number 65.

Q56. Can States use grant funds to prepare availability analyses?

A56. Costs incurred by States to prepare these analyses may be grant eligible. See answers to questions number 43 and 53.

Q57. Does EPA conduct audits of subrecipients or is it the Agency’s policy to only audit recipients of EPA financial assistance?

A57. EPA primarily relies on assistant recipients and subrecipients to conduct audits in accordance with the Single Audit act. Any additional audit work conducted by EPA is planned and performed in such a way as to build upon work performed by other auditors. Additional audit work, if warranted, is decided on a case-by-case basis.

Q58. Does construction involving equipment all fall under “construction”?

A58. It depends on what the contract specifies. For example, if a contract for the construction of a wastewater treatment plant requires the contractor to furnish the supplies and equipment as well as to build the facility, then in EPA’s view, the entire amount of that contract is for “construction”. On the other hand, if there is a contract to build a facility and a separate contract to furnish supplies and/or equipment, that separate contract would not constitute “construction”, but rather would be for “supplies” and/or “equipment”. Similarly, if there is a separate architect/engineering contract, that would constitute a contract for services, as apposed to construction.

Q59. Should a State agency include purchases made from “speciality” producers, such as specialized laboratory and sampling equipment, publications, etc., where in effect it is dealing with a sole source provider? Shouldn’t these purchases be excluded from the fair share calculation?

A59. No. All procurements should become part of the MBE/WBE calculation.

- Q60. Wouldn't it be logical to exclude a travel agent in reporting MBE/WBE service procurements since you are not actually procuring transportation from the travel agent, but rather using the money to purchase from the actual provider such as an airline?
- A60. MBE/WBE calculations include all procurements, including, procurements for travel agents.
- Q61. It was stated that the fair share goal is a stated percentage of the entire amount of the grant which includes federal dollars and the State match. In the case of a particular State Agency, the State match is provided by in-kind services since the State does not charge an indirect rate. In this case, should the State match still be included in the fair share goal?
- A61. It should be noted that the MBE/WBE requirements apply to procurement only. In-kind services provided by State employees are not considered procurement.
- Q62. Should certain items be included in the fair share calculation where a State Agency has no control or available options, such as postage, telephone services, and use of delivery services such as Federal Express or UPS?
- A62. Except for the U.S. Postal Service, these items should be considered in MBE/WBE calculations. If the State Agency uses an MBE/WBE delivery service or telephone company, for example that would count toward the fair share goals.
- Q63. A State Agency's historical numbers show a \$12,000 contract awarded to a firm who is both an MBE and WBE. The \$12,000 contract represents 9% of the State's agency procurement dollars. What should the fair share goals be for MBE and WBE based on these numbers?
- A63. It would be reasonable for a State Agency to propose a 4.5% fair share goal for MBE and a 4.5% fair share goal for WBE.
- Q64. Must a State negotiate fair share goals for both MBEs and WBEs?
- A64. Yes. EPA requires States negotiate fair share objectives for WBEs as well as for MBEs. EPA's position is consistent with Public Law 102-389, EPA's 1993 Appropriation Act, codified at 42 U.S.C. 43d, which

requires EPA “to the fullest extent possible, ensure that at least 8% of Federal funding for prime and subcontracts in support of authorized programs, including grants, ...be made available to business concerns...owned or controlled by socially and economically disadvantaged individuals...[including] women;” It also is consistent with Executive order 12138, issued on May 18, 1979, which requires all Federal agencies to take “appropriate affirmative action in support of [WBEs]” and OMB circular A-102, issued March 3, 1988, which provides that “[i]t is national policy to award a fair share of contracts to small and minority business firms: and that “[g]rantees shall take similar appropriate affirmative action... [in] support of women’s enterprises...” In addition, OMB-approved EPA Form 5700-52A, which must be completed by recipients of Federal grants, cooperative agreements or other Federal financial assistance, requires separate reporting for MBE and WBE procurements.

Q65. When a grant recipient “procures” meals, lodging, gasoline and emergency vehicle repair services for employees on official travel, does it have to undertake the six affirmative steps before each purchase?

A65. No, unless an MBE/WBE travel agent is utilized, in which case the amount purchased from that travel agent would be reported as a service.

### **Centralized Procurement Questions**

Q66. If most procurements are not made by a State Agency directly, but rather purchased through mandatory “State contracts” made through a centralized procurement office (e.g., cars, computers, furniture, copiers, maintenance contracts, etc.), are those purchases which are made by the centralized procurement office to be included or excluded in calculating the MBE/WBE fair share?

A66. Any procurement through the State contract or a centralized procurement office should be included in the MBE/WBE goal calculation.

Q67. How are State prequalified lists affected by the availability analyses requirements?

A67. Unless a State has already conducted a disparity study, it needs to submit an availability analysis to EPA supporting its proposed “fair share” objectives. The analysis must address the availability of qualified

minority and women-owned businesses to do the work in the relevant market for construction, equipment, services and supplies. Merely because a State may have prequalified lists as part of its use of a central procuring office, e.g., General Services or Central Purchasing Office, does not relieve it from submitting an availability analysis for supplies and equipment. EPA recognizes that a number of States obtain their supplies and/or equipment through a central procuring office which uses prequalified lists. For reporting purposes, however, so long as minority and women-owned businesses were afforded an opportunity by the State to compete to be included on State prequalified lists for such centralized procurement, State utilization of such lists will be accepted by EPA.

In calculating “fair share” achievements for such central procuring for supplies and/or equipment, a State may use one of the following criteria:

- (a) If adequate records are maintained, such as procurement history files, and it can be determined that a minority or women-owned business was the seller of the product(s), the actual dollars expended may be counted, for each of the affected groups; or
- (b) If adequate records are maintained for State minority and women-owned businesses procurement as a whole but records are not maintained for EPA assistance awards specifically, the State’s MBE/WBE percentage achievement for State funds as a whole may be extrapolated to EPA assistance awards; or
- (c) If adequate records are not maintained but historically the central procuring office has been authorized by the State to estimate the total dollars being placed with minority and women-owned businesses, such estimate will be accepted.

Q68. What is EPA’s policy regarding central procuring options where a State is precluded by State law from implementing an MBE/WBE program of its own?

A68. See Answer to Question number 67.

## **Reporting Requirements**

- Q69. Can reports to EPA be filed electronically?
- A69. Regional reports to OSDBU can be filed electronically. Recipients, however, need to file EPA Form 5700-52A. That form cannot be filed electronically at this time because there is no automated reporting system in place to receive this information.
- Q70. Can EPA have lesser reporting requirements for assistance awards to municipalities, and for small grants and grants to nonprofit organizations?
- A70. The effectiveness of the “fair share” policy is measured through the reporting requirements. EPA requires quarterly reporting for the following programs: Wastewater treatment construction (including non-Title II assistance awards), Superfund, Clean Water and Drinking Water State Revolving Funds, Asbestos (ASHAA) and Leaking Underground Storage Tank (LUST). Reports for continuing environmental programs (See 40 CFR Part 35, Subpart A), performance partnership grants and awards to institutions of higher education, hospitals and other non-profit organizations are only required annually. Thus many of the recipients referenced in this question have lesser requirements already than many other EPA assistance award recipients.
- Q71. Can grant recipients have 2 extra weeks to comply with the reporting requirements in order to verify the numbers reported by the prime contractor?
- A71. EPA is unable to give grant recipients this additional time due to the Department of Commerce’s reporting requirements.
- Q72. What information specified on page 4-5 of the Guidance Document has to be reported to Headquarters?
- A72. All of the requested information needs to be reported to OSDBU.

Q73. Are all recipients including States required to report to EPA on procurements for supplies and equipment, and how are they to report if a central purchasing agency is not currently tracking such procurements?

A73. Yes. Additionally, see the answer to question number 67.

Q74. Are all recipients required to file MBE/WBE reports?

A74. All recipients are required to file MBE/WBE reports except for Trust Territories and Indian Tribes. That policy currently is under review.

Q75. In the case of performance partnership grants, how will MBE/WBE reporting be tracked?

A75. These grants will be tracked in the same manner as other EPA assistance agreements.

Q76. How will MBE/WBE reporting be tracked vis- a-vis the small grants policy?

A76. The small grants policy has been revised to require budget information at the object class level. Therefore small grants recipients will continue their current MBE/WBE reporting.

Q77. Can EPA come up with a procurement dollar threshold where no MBE/WBE reporting is required?

A77. At this time EPA will not establish such a procurement dollar threshold.

Q78. Can the computer software be standardized so that reports can be transmitted electronically to the Regions?

A78. EPA is examining whether this can be accomplished.

### **Interagency Agreement Questions**

Q79. In the case of interagency agreements where grants/cooperative agreements are made by the receiving agency, what goal numbers should be used?

A79. In the case of interagency agreements, where a receiving agency awards grants or cooperative agreements under the IAG it agrees to ensure that (1) governmental assistance recipients, when awarding contracts, comply with the 6 affirmative steps to utilize small businesses, MBEs and WBEs outlined in the common rule governing administrative requirements for grants with State, Tribal and local governments (see, e.g., 40 CFR§ 31.36 (c); and (2) that non-governmental assistance recipients, when awarding contracts, make positive efforts to utilize small businesses, MBEs and WBEs as required by the common rule governing administrative requirements for grants and cooperative agreements with institutions of higher education, hospitals and other non profit organizations (see, e.g., 40 CFR §30.44 (b)). If the receiving Agency awards a contract under the IAG, it agrees to comply with the utilization requirements for MBEs and WBEs set forth in the Small Business Act, 15 U.S.C. 631 et seq. and the annual Small Business goals negotiated with the Small Business Administration (SBA).

Q80. In the case of interagency agreements should MBE/WBE utilization reports go to the Regions as well as to Headquarters?

A80. Yes. A copy should be sent to the appropriate MBE/WBE Regional Coordinator.

### **SRF-related Questions**

Q81. Can contractor availability for the Drinking Water SRF be different from other EPA programs?

A81. Yes, it is possible that for a given State, Drinking Water SRF contractor availability may be different than for other types of EPA programs.

Q82. In the case of the Drinking Water SRF, how will hardship loans be addressed?

A82. Hardship loans under the Drinking Water SRF are to be treated by States for MBE/WBE purposes in the same manner as other elements of that program.

Q83. How will the availability analysis requirements apply to the Drinking Water SRF program which may not yet be funded in a given State?

A83. The same availability analysis requirements apply to the Safe Drinking Water SRF program as to other EPA programs. For FY 1998, the Safe Drinking Water SRF Program can use the MBE/WBE goals based on the State's availability analysis for the Clean Water SRF program, if it does not wish to prepare its own availability analysis.

Q84. Can Form 5700-52A incorporate the SRF requirements?

A84. That form applies to all EPA programs, including the SRF programs. The State must submit an MBE/WBE Utilization Report within 30 days after the end of each quarter in which it or its selected loan recipient awards procurements. See 40 CFR 35.3145(e). (Note - Form 5700-52A is the successor to Form SF 334).